Supreme Court, U.S.
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No. 95-538

In The

Supreme Court of the United States

October Term, 1995

In re: BERNARD J. DOLENZ,

Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals correctly hold that this bad faith action was not a direct action as defined under 28 U.S.C. § 1332(c).

PARTIES TO THE PROCEEDINGS

Petitioner, Bernard J. Dolenz, 6102 Swiss Avenue, Dallas, Texas 75214, is an individual.

Respondent, Nationwide Indemnity Insurance Company, is an Ohio corporation wholly owned by Nationwide Mutual Insurance Company, an Ohio corporation.

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TO THE HONORABLE SUPREME COURT:

The Respondent, Nationwide Indemnity Insurance Company, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Bernard J. Dolenz.

OPINIONS BELOW

This suit was originally brought in the 101st Judicial District Court of Dallas County, Texas and was removed to the United States District Court for the Eastern District of Texas based on diversity of citizenship. Petitioner failed to file a motion to remand based on his assertion that this is a worker's

compensation case until thirty-nine days after Nationwide filed its notice of removal.

After referral to a magistrate judge, Nationwide's motion for summary judgment was granted on July 29, 1994. The United States Court of Appeals for the Fifth Circuit affirmed the district court's grant of summary judgment on June 9, 1995.

STATUTE INVOLVED

The statute in issue here is 28 U.S.C. § 1332(c).

STATEMENT OF THE CASE

Contrary to the assertions of Petitioner, this is not a worker's compensation case. Petitioner's failure to accurately present to this Court the nature and basis of the claims is itself sufficient reason to deny certiorari. Sup. Ct. R. 14.4. Petitioner, a psychiatrist and attorney, brought suit against Respondent based partly on claims in his individual capacity and partly on claims which he was allegedly assigned by Bradley Graves as a prerequisite to being seen as a patient. (R.Vol. I; 4). According to the face of his original petition, Petitioner sought recovery on the following causes of action: suit on a sworn account; negligent breach of contract; tortious interference with contract; *quantum meruit*; fraud; unspecified but constitutionally mandated torts; statutory and common law bad faith and exemplary damages.

It is important to keep in mind what Petitioner's suit is not. It is not an action brought by the injured employee, Bradley Graves, against Nationwide seeking workers' compensation benefits. That issue was resolved by settlement. Furthermore, it is not a lawsuit brought by Graves seeking actual damages for breach of a compromise settlement agreement. In fact, it is not a lawsuit seeking any damages on behalf of Graves at all. Most

importantly, this suit is more aptly characterized as a suit for breach of the duty of good faith and fair dealing brought by Petitioner that does not seek any relief under the workers' compensation laws of Texas as they then existed.

SUMMARY OF THE ARGUMENT

I. This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. Contrary to Petitioner's assertions, this is not a "direct action" within the meaning of 28 U.S.C. § 1332(c) and thus Respondent is not deemed to hold the same citizenship as its insured, Noel Furniture. Although arising from the then-existing Texas statutory workers' compensation scheme, Petitioner's suit is in actuality a bad faith suit combined with other state common law causes of action to which § 1332(c) does not, and was never intended, to apply.

II. Summary judgment was properly granted for Respondent because of Petitioner's failure to raise any genuine issues for trial.

REASONS FOR DENYING THE WRIT

Petitioner fails to satisfy the criteria traditionally applied by the Court in determining whether to grant a petition for writ of certiorari. The court of appeals below properly recognized that Petitioner's lawsuit was a bad faith action to which 28 U.S.C. § 1332(c) does not apply, Petitioner's disingenuous representations to this Court notwithstanding. Furthermore, the summary judgment evidence introduced by Respondent affirmatively proved that there was no genuine issue of fact for trial, and hence summary judgment was properly granted.

I.

SUITS FOR INSURER BAD FAITH ARE NOT DIRECT ACTIONS WITHIN THE MEANING OF 28 U.S.C. § 1332(c).

28 U.S.C. § 1332(c) governs diversity of citi. nship and sets up legal fictions for destroying diversity in specific, limited circumstances. In relevant part, § 1332(c)(1) pertains to insurers against whom "direct actions" are brought:

> For the purposes of this section . . . in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business[.]

28 U.S.C. § 1332(c)(1).

The intent of Congress in enacting and amending § 1332(c)(1) was to "defederalize" jurisdiction over lawsuits in states and territories which permit plaintiffs to bring "direct actions" against the insurers of their alleged tortfeasors, instead of suing the tortfeasors and then becoming judgment creditors of the tortfeasor's liability insurer. *Williams v. Liberty Mutual Insurance Company*, 468 F.2d 1207, 1209 (5th Cir. 1972). The basis for direct actions under § 1332(c) is derivative liability, where a claim is brought directly against the insurer when it could have been brought against the insured instead. The claims brought by Petitioner involved no such liability. Instead,

Petitioner sought to impose liability directly against Respondent for its own actions rather than the actions of its insured.

Federal courts of appeal have consistently and correctly held that actions alleging insurer bad faith are not "direct actions" within the meaning of § 1332(c). *See Searles v. Cincinnati Ins. Co.*, 998 F.2d 728, 730 (9th Cir. 1993); *Tuck v. United Services Automobile Association*, 859 F.2d 842, 847 (10th Cir. 1988); *Fortson v. St. Paul Fire & Marine Ins. Co.*, 751 F.2d 1157, 1159 (11th Cir. 1985); *Beckham v. Safeco Ins. Co. of America*, 691 F.2d 898 (9th Cir. 1982). As the *Beckham* court correctly pointed out:

> Courts have uniformly defined the term "direct action" . . . as those cases in which a party suffering injuries or damages for which another is legally responsible is entitled to bring suit against the other's liability insurer without joining the insured or first obtaining a judgment against him. Thus, "unless the cause of action urged against the insurance company is of such a nature that the liability sought to be imposed could be imposed against the insured, the action is not a direct action." [For this reason, no suit is a direct action when it is] seeking to impose liability on [an insurer] for its own tortious conduct, i.e., [for the insurer's] bad faith refusal to settle....

Beckham, 691 F.2d at 901-902. *Accord, John Cooper Produce Co., Inc. v. Paxton Nat'l Ins. Co.*, 774 F.2d 433, 435 (11th Cir. 1985) ("[T]he statute will defeat diversity jurisdiction only if the claim which the third party has against the insured — for intentional tort, negligence, fraud, etc. — is the same one asserted against the insurance company as within the zone of primary liability for which the company issued the policy.").

"Direct actions" are lawsuits in which tort victims are entitled to bring suit against a tortfeasor's insurer without joining the tortfeasor or first obtaining judgment against him. *Beckham*, 691 F.2d at 901-902. By analogy, workers' compensation actions have been classified as "direct actions" on several occasions. However, there is no "direct action" where an insured sues his own carrier for bad faith. It logically follows then that a third party such as Petitioner who is a stranger to the policy does not bring a "direct action" against an insurer for damages resulting from the insurer's own conduct and not the conduct of its insured.

II.

SUMMARY JUDGMENT WAS PROPERLY GRANTED FOR RESPONDENT BECAUSE RESPONDENT'S PROOF CLEARLY ESTABLISHED THAT THERE WAS NO GENUINE ISSUE FOR TRIAL.

Petitioner fails to recognize that the summary judgment in this case was based on affirmative evidence introduced by Respondent in support of its motion as well as the failure of the Petitioner to come forward with evidence demonstrating a prima facie case. The motion for summary judgment and accompanying evidence established as a matter of law that either Petitioner had no legally cognizable claim based on his position as a stranger to Respondent's policy or that at least one of the elements of each of the causes of action asserted by Petitioner were conclusively established against him.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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